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CLERK US DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BY                      DEPUTY

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

CHAD MCKINNEY, an individual,  
Plaintiff,

vs.

APOLLO GROUP INC., UNIVERSITY  
OF PHOENIX, a Corporation,  
MECHELLE BONILLA, an Enrollment  
Manager at UNIVERSITY OF  
PHOENIX, KYAN FLYNN, Director of  
Enrollment at UNIVERSITY OF  
PHOENIX, APRIL ALCORN, an  
Employee Relations Consultant at  
UNIVERSITY OF PHOENIX, CARLYN  
LINDSTEN, Associate Director of  
Enrollment at UNIVERSITY OF  
PHOENIX,

Defendants.

CASE NO. 07cv2373 WQH (CAB)

**ORDER**

HAYES, Judge:

The matters before the Court are the (1) Motion for Default Judgment as to Apollo Group, Inc. (Doc. # 6), (2) Motion to Set Aside Default by Apollo Group, Inc. (Doc. # 9), (3) Motion to Dismiss for Lack of Jurisdiction by Apollo Group, Inc. (Doc. # 10), (4) Motion for Default Judgment as to Mechelle Bonilla (Doc. # 29), (5) Motion for Default Judgment as to Kyan Flynn (Doc. # 30), (6) Motion for Default Judgment as to Carlyn Lindsten (Doc. # 31), (7) Motion to Dismiss Plaintiff's Complaint, or In the Alternative, Motion for More Definite Statement by Kyan Flynn, Mechelle Bonilla and Carlyn Lindsten (Doc. # 40), (8) Motion to Set Aside Default by Kyan Flynn, Mechelle Bonilla and Carlyn Lindsten (Doc. # 41), (9)

1 Motion for Default Judgment as to April Alcorn (Doc. # 42), (10) Motion for Default  
 2 Judgment as to University of Phoenix (Doc. # 43), (11) Motion to Dismiss for Lack of  
 3 Jurisdiction by University of Phoenix (Doc. # 44), (12) Motion to Dismiss for Lack of  
 4 Jurisdiction by April Alcorn (Doc. # 46), (13) Motion to Set Aside Default by University of  
 5 Phoenix (Doc. # 47), (14) Motion to Set Aside Default by April Alcorn (Doc. # 49), and (15)  
 6 Plaintiff's Motion to Strike the Defendants' Notice of Non-Opposition (Doc. # 69).

# 7 **I. Background**

8 On December 19, 2007, Plaintiff Chad McKinney initiated this action by filing the  
 9 Complaint (Doc. # 1). The Complaint alleges that Plaintiff's claims "arise[] primarily from  
 10 the defendant's discriminatory behavior against the plaintiff while the plaintiff was employed  
 11 by the defendant, including but not limited to the wrongful termination of the plaintiff."  
 12 *Complaint*, ¶ 1. The Complaint alleges claims against the following Defendants: Apollo  
 13 Group, Inc. ("Apollo Group"), the parent company of the University of Phoenix; the University  
 14 of Phoenix, a Corporation; Michelle Bonilla, Enrollment Manager of the University of  
 15 Phoenix; Kyan Flynn, Director of Enrollment of the University of Phoenix; Carlyn Lindsten,  
 16 Associate Director of Enrollment of the University of Phoenix; and April Alcorn, Human  
 17 Resources Manager of the University of Phoenix (collectively referred to as "Defendants").  
 18 The Complaint alleges the following causes of action: (1) Retaliation, in violation of the False  
 19 Claims Act; (2) Retaliation, in violation of Title VII of the 1964 Civil Rights Act; (3)  
 20 Wrongful Termination; (4) False Imprisonment; (5) Intentional Infliction of Emotional  
 21 Distress; (6) Defamation; and (7) Equal Pay.

22 After the Complaint was filed and pursuant to Plaintiff's requests, the Clerk of the  
 23 Court entered default as to each Defendant, pursuant to Rule 55(a) of the Federal Rules of  
 24 Civil Procedure (Docs. # 5, 16, 19, 20, 38, 39). Following the Clerk's entry of default,  
 25 Plaintiff filed Motions for Default Judgment as to each Defendant (collectively referred to as  
 26 the "Motions for Default Judgment") (Docs. # 6, 29, 30, 31, 42, 43). Defendants filed  
 27 Oppositions to the Motions for Default Judgment (Docs. # 11, 28, 48, 50). Plaintiff filed  
 28 Replies (Docs. # 52, 55, 61, 63). Following Plaintiff's Motions for Default Judgment,

1 Defendants filed Motions to Set Aside Default (collectively referred to as the “Motions to Set  
2 Aside”) (Docs. # 9, 41, 47, 49). Plaintiff filed Oppositions to the Motions to Set Aside (Docs.  
3 # 51, 65, 67). Defendants filed Replies (Docs. # 84, 85). Defendants also filed Motions to  
4 Dismiss for Lack of Jurisdiction, or in the Alternative, Motions to Strike (collectively referred  
5 to as the “Motions to Dismiss”) (Docs. # 10, 40, 44, 46). Defendants filed a notice of non-  
6 opposition to the Motions to Dismiss filed by Defendants. In response, Plaintiff filed a Motion  
7 to Strike the Defendants’ Notice of Non-Opposition to the Motion to Dismiss (Doc. # 69).  
8 Plaintiff filed Oppositions to the Motions to Dismiss (Docs. # 76, 77, 78, 79). Defendants filed  
9 Replies (Docs. # 80, 81, 82, 83).

## 10 **II. Analysis - Sufficiency of Service of Process**

### 11 **A. Defendants’ Contentions Regarding Service of Process**

#### 12 **(i) The Corporate Defendants**

13 Apollo Group and the University of Phoenix (collectively referred to as the “Corporate  
14 Defendants”) contend that Plaintiff did not effect service of process pursuant to Rule 4(h) of  
15 the Federal Rules of Civil Procedure, which governs service on a corporation, because Plaintiff  
16 did not serve the summons and complaint on an officer, general manager or designated agent  
17 for service of process. The Corporate Defendants contend that Plaintiff instead “simply  
18 dropped off an envelope to a [University of Phoenix] employee, Ellen Bowens, and expected  
19 this to constitute sufficient service of process . . . . This is unacceptable under California law  
20 and the Federal Rules.” (Docs. # 10, 44, p. 5). The Corporate Defendants move the Court to  
21 set aside the Clerk’s entry of default pursuant to Rule 55, and to dismiss the Complaint for lack  
22 of jurisdiction pursuant to Rules 12(b)(2) and 12(b)(5) on grounds that Plaintiff did not  
23 properly serve them.

24 The Corporate Defendants each submitted an identical declaration of Ellen Bowens,  
25 who according to Plaintiff, accepted service on behalf of them. Bowens attests that on January  
26 31, 2008 (the date on which Plaintiff asserts he effected service on the Corporate Defendants),  
27 she was the operations manager for University of Phoenix’s San Diego campus. Bowens  
28 attests that she “did not, and do not, have management responsibilities to direct” the Corporate

1 Defendants, and that she has “never been an officer, managing agent, general manager or  
 2 authorized agent able to accept service of process” on behalf of the Corporate Defendants.  
 3 (Doc. # 47-4). Bowens further attests:

4 On or around the end of January 2008, I was asked by a subordinate receptionist  
 5 to help with a man trying to ‘serve’ court papers at her desk. I do not recall the  
 6 man identifying himself, but I informed him that neither I nor the receptionist  
 7 was authorized to accept service on behalf of [the Corporate Defendants]. I then  
 8 informed the man that [the Corporate Defendants] had an agent for service of  
 9 process, CT Corporation. The man then stated that we ‘did not know the law,’  
 10 left the papers on a table and stormed away. . . . I . . . called [the Corporate  
 11 Defendants’] Human Resources Department and mailed the papers to that  
 12 department. I do not know what happened to that stack of legal papers since that  
 13 time.

14 *Id.*

15 (ii) The Individual Defendants

16 Bonilla, Flynn, Lindsten and Alcorn (collectively referred to as the “Individual  
 17 Defendants”) contend that Plaintiff did not effect service of process pursuant to Rule 4(e) of  
 18 the Federal Rules of Civil Procedure, which governs service of process on an individual. The  
 19 Individual Defendants contend that “[a]ccording to [Plaintiff’s] proofs of return service, he  
 20 attempted to serve the [Individual Defendants] under California law through substitute service  
 21 at [their] place of work.” (Docs. # 40, p. 5; 49, p. 6). The Individual Defendants contend that  
 22 Plaintiff “failed to comply with the requirements of California law, and therefore FRCP Rule  
 23 4(e), because he did not demonstrate that he made a good faith attempt at personal service nor  
 24 that he provided mail copies of the summons and complaint to the Individual Defendants via  
 25 pre-paid first class mail.” *Id.*

26 Individual Defendants Bonilla, Flynn and Lindsten each submitted the declaration of  
 27 Bowens, who according to Plaintiff, accepted service on behalf of Bonilla, Flynn and Lindsten.  
 28 The declarations of Bowens submitted by Bonilla, Flynn and Lindsten are identical to the  
 declarations submitted by the Corporate Defendants, discussed above. Individual Defendant  
 Alcorn submitted the declaration of Rebecca Springfield who, according to Plaintiff, accepted  
 service on behalf of Alcorn. Springfield attests:

[A]round the end of February 2008, a gentleman approached me and attempted  
 to hand me a stack of legal papers. I told the gentleman that I was not allowed  
 to accept any legal papers on behalf of anyone for Apollo and attempted to give

1 him the contact information for the proper place to do so, CT Corporation. The  
 2 gentleman refused to listen and just dropped the papers on the desk in front of  
 me and walked away.

3 I do not know or work with April Alcorn and did not know that the papers left  
 4 by the gentleman were intended for her or if they were ever given to her.

(Doc. # 49-5). The Individual Defendants also submitted their own declarations. Each  
 5 Individual Defendant attests: "I was never personally served with any legal document  
 6 regarding this matter, nor have I been made aware of any attempts to be personally served with  
 7 legal documents in this matter. Furthermore, I have never received a copy of the summons and  
 8 complaint in this matter either by mail or any other means" from Plaintiff. (Docs. # 41-3, 41-  
 9 4, 41-5, 49-4).

10 B. Plaintiff's Contentions Regarding Service of Process

11 Plaintiff contends that the Corporate Defendants were properly served. With respect  
 12 to the service of process on each Corporate Defendant, Plaintiff states:

13 The defendant was served at its San Diego office by professional certified  
 14 service processor Mr. R. T. Hansell. The Defendant was properly served,  
 15 henceforth is subject to the jurisdiction of the Court. [Each Corporate  
 Defendant] did in fact receive proper service as can be evidenced by" the  
 Declaration of R.T. Hansell.

16 (Docs. # 79, p. 3).

17 Plaintiff contends that the Individual Defendants were also properly served. With  
 18 respect to the service of process on Bonilla, Flynn and Lindsten, Plaintiff states:

19 The defendants were served at their San Diego office by professional certified  
 20 service processor Mr. R. T. Hansell. [Bonilla, Flynn and Lindsten] were properly  
 21 served, henceforth are subject to the jurisdiction of the Court. [Bonilla, Flynn  
 and Lindsten] did in fact receive proper service as can be evidenced by" the  
 Declaration of R.T. Hansell.

22 (Docs. # 76, p. 3). With respect to the service of process on Alcorn, Plaintiff states that  
 23 service on Alcorn was proper "as is again demonstrated in . . . a sworn affidavit of service by  
 24 Steve Ineich, A.C.P.S. Process Server registered in Maricopa County . . . stating that he  
 25 properly served the Defendant April Alcorn 'by leaving one true copy(ies) of the above  
 26 documents [summons, complaint & cover sheet] with Rebecca Springfield, Security  
 27 Authorized.'" (Doc. # 77, p. 2-3).  
 28

1 In support of his contention that service on the Corporate Defendants and Individual  
 2 Defendants Bonilla, Flynn and Lindsten was proper, Plaintiff submitted the declaration of  
 3 Hansell, who attests that “[o]n the 31st of January, 2008, according to the Federal Rules of  
 4 Civil Procedure 4(e)(1) I properly served” these Defendants. (Docs. # 76, 79 Exhibit C).

5 Hansel attests:

6 At the time of service, Ellen Bowens declared herself to be an Administrator and  
 7 the only person available. Ellen Bowens, who is actually the Operations  
 8 Manager for the University of Phoenix, a wholly owned subsidiary of Apollo  
 9 Group, Inc. refused to cooperate and produce the defendant employees for  
 10 personal service, or any other person to accept for the defendant companies.  
 11 Substitute service was then effected.

12 *Id.* In support of his argument that service on Individual Defendant Alcorn was properly  
 13 effected, Plaintiff submitted the affidavit of Steve Ineich, A.C.P.S., who attests that service on  
 14 Alcorn was effected “[b]y leaving one true copy(ies) of the above documents with Rebecca  
 15 Springfield, Security, Authorized.” (Doc. # 77, Exhibit C).

16 C. Applicable Law Governing Service of Process

17 “Without a proper basis for jurisdiction, or in the absence of service of process, the  
 18 district court has no power to render any judgment against the defendant’s person or property  
 19 unless the defendant has consented to jurisdiction or waived the lack of process.” *S.E.C. v.*  
 20 *Ross*, 504 F.3d 1130 (9th Cir. 2007). “A federal court is without personal jurisdiction over a  
 21 defendant unless the defendant has been served in accordance” with Rule 4 of the Federal  
 22 Rules of Civil Procedure. *Id.* at 1130. Once service is challenged, the plaintiff bears the  
 23 burden of establishing sufficiency of process. *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir.  
 24 2004). Rule 4 of the Federal Rules of Civil Procedure governs service of process. Although  
 25 Rule 4 is a flexible rule that should be liberally construed, “neither actual notice nor simply  
 26 naming the defendant in the complaint will provide personal jurisdiction absent ‘substantial  
 27 compliance with Rule 4.’” *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986).

28 Rule 4(e) governs service on individuals within a judicial district of the United States.  
 Rule 4(e) provides that a plaintiff may serve an individual by:

(1) following state law for serving a summons in an action brought in courts of  
 general jurisdiction in the state where the district court is located or where  
 service is made; or



1 (2) doing any of the following:

2 (A) delivering a copy of the summons and of the complaint to the  
3 individual personally;

4 (B) leaving a copy of each at the individual's dwelling or usual place of  
5 abode with someone of suitable age and discretion who resides there; or

6 (C) delivering a copy of each to an agent authorized by appointment or  
by law to receive service of process.

7 FED. R. CIV. P. 4(e). California state law allows for service upon an individual by delivering  
8 a copy of the summons and complaint by "personal delivery or any authorized agent for service  
9 of process;" "[s]ubstitute service coupled with mailing after a good faith effort at personal  
10 service has been attempted;" or "[s]ervice by publication." Cal. Code Civ. Proc. §§ 415.10,  
11 415.20, 415.30, 415.50.

12 Rule 4(h) governs service on a "domestic or foreign corporation, or a partnership or  
13 other unincorporated association that is subject to suit under a common name" within a judicial  
14 district of the United States. Rule 4(h) provides that service may be effected:

15 (A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or

16 (B) by delivering a copy of the summons and of the complaint to an officer, a  
17 managing or general agent, or any other agent authorized by appointment or by  
law to receive service of process and – if the agent is one authorized by statute  
and the statute so requires – by also mailing a copy of each to the defendant.

18 FED. R. CIV. P. 4(h). California state law allows for service upon a corporation by delivering  
19 a copy of the summons and complaint "[t]o the person designated as agent for service of  
20 process;" or "[t]o the president or other head of the corporation, a vice president, a secretary  
21 or assistant secretary, a treasurer or assistant treasurer, a general manager, or a person  
22 authorized by the corporation to receive service of process." Cal. Code Civ. Proc. § 416.10.

23 Pursuant to Rule 55(c), a court may set aside an entry of default for good cause. FED.  
24 R. CIV. P. 55(c). "Failure to properly serve a defendant with process pursuant to Fed. R. Civ.  
25 P. 4 constitutes good cause to set aside an entry of default." *Koninklijke Philips Elecs. N.V.*  
26 *v. KXD Tech., Inc.*, 245 F.R.D. 470, 472 (C.D. Cal. 1992). The court has broad discretion in  
27 deciding whether to set aside the entry of default pursuant to Rule 55(c). *Mendoza v. Wight*  
28 *Vineyard Management*, 783 F.2d 941, 945 (9th Cir. 1986). There is a strong preference for

1 trial on the merits, and any doubts should be resolved in favor of setting aside the default.  
2 *Direct Mail Specialists v. Eclat Computerized Technologies*, 840 F.2d 685, 690 (9th Cir.  
3 1988).

4 When a court determines that service of process is insufficient, it has broad discretion  
5 to either dismiss the action without prejudice or retain the case but quash the service of  
6 process. *Oyama v. Sheehan*, 253 F.3d 507, 513 (9th Cir. 2001); *see also* 5 C. Wright & A.  
7 Miller, *Federal Practice and Procedure* § 1354, at 585-86 (1969). A court should generally  
8 quash service of process instead of dismissing the action when there is a reasonable prospect  
9 that the plaintiff ultimately will be able to serve the defendant properly. *Brockmeyer*, 383 F.3d  
10 at 801. "Pro se litigants are allowed more latitude than litigants represented by counsel to  
11 correct defects in service of process and pleadings." *Moore v. Agency for Int'l Development*,  
12 301 U.S. App. D. C. 327 (D.C. Cir. 1993).

13 D. Analysis Regarding Service of Process on Defendants

14 To demonstrate that they were not properly served, Defendants submitted evidence that  
15 demonstrates that, at the time Plaintiff asserts Defendants were served, neither Bowens nor  
16 Springfield were officers, or managing or general agents of Apollo Group or the University of  
17 Phoenix, and were not otherwise authorized to receive service of process. Defendants also  
18 submitted evidence that demonstrates that the Individual Defendants were never personally  
19 served with copies of the summons and complaint, and never received copies of the summons  
20 and complaint in the mail. To demonstrate that Defendants were properly served, Plaintiff  
21 submitted the declaration of Hansell, who attests he properly served the Corporate Defendants  
22 and Individual Defendants Bonilla, Flynn and Lindsten by leaving copies of the summons and  
23 complaint with Bowens, who declared herself to be an administrator. Plaintiff submitted the  
24 declaration of Ineich, who attests that he properly served Individual Defendant Alcorn by  
25 leaving copies of the summons and complaint with "Rebecca Springfield, Security,  
26 Authorized." (Doc. # 77, Exhibit C). However, Plaintiff has failed to submit any evidence to  
27 rebut Defendants' showing that Bowens and Springfield were not the appropriate people to  
28 accept service of process on behalf of any of the Defendants under Rule 4. Plaintiff also failed



1 to submit any evidence that demonstrates that he made a good-faith effort to personally serve  
2 the Individual Defendants, or that a copy of the summons and complaint was mailed to the  
3 Individual Defendants after substitute service was effected, as required by Rule 4(e). Plaintiff  
4 does not assert that the summons and complaint were delivered to any of the Individual  
5 Defendants personally, that the summons and complaint were left at the dwelling or abode of  
6 any of the Individual Defendants with someone of suitable age and discretion who resides  
7 there, or that service was effected by publication. Plaintiff does not assert that any of the  
8 Defendants consented to jurisdiction or waived the lack of process.

9 In light of the foregoing, the Court concludes that Plaintiff has failed to properly serve  
10 any of the Defendants. The Court concludes that good cause exists to set aside the entry of  
11 default pursuant to Rule 55(c) because Plaintiff has failed to effect service on any of the  
12 Defendants. In light of Plaintiff's pro se status and there being a reasonable prospect that  
13 Plaintiff can correct the defects in the service of process on the Defendants, the Court will  
14 retain the case, but quash service of process. The Court concludes that consideration of the  
15 Motions for Default Judgment and the Motions to Dismiss to the extent they seek dismissal for  
16 failure to state a claim is improper at this time because Defendants have not been properly  
17 served.

### 18 Conclusion

19 IT IS HEREBY ORDERED that the Motion to Set Aside Default by Apollo Group,  
20 Inc. (Doc. # 9), Motion to Set Aside Default by Kyan Flynn, Mechelle Bonilla and Carlyn  
21 Lindsten (Doc. # 41), Motion to Set Aside Default by University of Phoenix (Doc. # 47), and  
22 Motion to Set Aside Default by April Alcorn (Doc. # 49) are **GRANTED**.

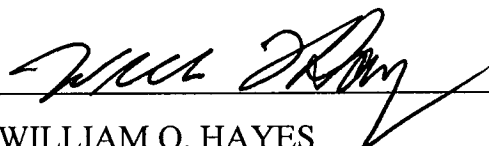
23 IT IS FURTHER ORDERED that service of process upon each Defendant is  
24 **QUASHED**. Plaintiff has forty-five (45) days from the date of this order in which to either  
25 (1) properly serve each Defendant in accordance with applicable law, or (2) file a waiver of  
26 service. The Motion to Dismiss for Lack of Jurisdiction by Apollo Group, Inc. (Doc. # 10),  
27 Motion to Dismiss Plaintiff's Complaint, or In the Alternative, Motion for More Definite  
28 Statement Kyan Flynn, Mechelle Bonilla and Carlyn Lindsten (Doc. # 40), Motion to Dismiss

1 for Lack of Jurisdiction by University of Phoenix (Doc. # 44), and Motion to Dismiss for Lack  
2 of Jurisdiction by April Alcorn (Doc. # 46) are **DENIED without prejudice.**

3 IT IS FURTHER ORDERED that the Motion for Default Judgment as to Apollo Group,  
4 Inc. (Doc. # 6), Motion for Default Judgment as to Mechelle Bonilla (Doc. # 29), Motion for  
5 Default Judgment as to Kyan Flynn (Doc. # 30), the Motion for Default Judgment as to Carlyn  
6 Lindsten (Doc. # 31), Motion for Default Judgment as to April Alcorn (Doc. # 42), and Motion  
7 for Default Judgment as to University of Phoenix (Doc. # 43) are **DENIED without**  
8 **prejudice.**

9 IT IS FURTHER ORDERED that Plaintiff's Motion to Strike the Defendants' Notice  
10 of Non-Opposition (Doc. # 69) is **DENIED without prejudice.**

11  
12  
13  
14 DATE: 7/22/08

  
\_\_\_\_\_  
WILLIAM Q. HAYES  
UNITED STATES DISTRICT JUDGE